May 18, 2020

COVID-19 and Reimagining the Workplace: Daily Briefing Recap
The Restaurant Industry:
Practical Considerations for Bringing Employees Back

Please note that the following is a recap of our Daily Briefing from May 18, 2020. Due to the rapidly evolving nature of the pandemic, we recommend that you consult the most up to date materials possible. Visit Jackson Lewis P.C.’s COVID-19 resource page for updates on workplace impacts and sign up here to receive invitations to future daily COVID-19 webinar briefings and email updates on ongoing legal and workplace health challenges.

Rehiring Employees

Selecting Who to Bring Back

- As with a mass layoff, employers need to implement objective, consistent criteria:
  - Criteria should be defensible and non-discriminatory, e.g., tenure, performance.
  - Be aware of the potential for discrimination claims brought by employees who are not brought back to the workplace.
- Not rehiring someone may be viewed through the same lens as a termination:
  - Consider documenting these decisions in the same way you would for a termination.
- Furlough versus layoff:
  - Furloughed employees may expect that they will be among the first group returned.
  - Be especially cognizant of your decision-making process and selection criteria if you pass over furloughed employees for new hires or re-hires.
- Decisions do not present a “clean slate” for restaurants to bring back only those employees they want to return.
- Keep WARN issues in mind:
  - Even in places where restaurants are able to re-open, ongoing limits on capacity may mean reduced staffing needs for the foreseeable future.
Onboarding Requirements

- Terminated employees who are rehired should be onboarded as new employees:
  - Issue all required notices for new hires (you will not need a new I-9 for employees gone less than 6 months).
  - Check furlough rules in your jurisdiction – some states may require you to treat furloughed employees as new hires after a set period of time.
  - Best practice is to reissue your employee handbook along with other legally required policies, e.g., sexual harassment policy, sick leave, etc.
- Your benefit plans may require waiting periods for employees who were off-plan during their time away from work.

Risks of Operating at Reduced Staffing Levels

- Consider whether exempt employees are still properly classified:
  - Do managers/supervisors have enough employees to supervise to qualify for the executive exemption?
  - With reduced staffing, are managers/supervisors still supervising as their primary duty?
- In states where the 80/20 rule applies, be cognizant of whether certain employees are now performing a higher percentage of non-service work:
  - Under the rule, employees can be paid at the tip credit rate only if they spend no more than 20% of their time on non-tip-generating work.
  - Violations of the rule could jeopardize employers’ use of the tip credit.
- There may be confusion over who is eligible to receive tips, e.g., managers involved in service in reduced staffing scenarios.

Making Business Operations Work During the Pandemic

- Create COVID-19 assessment protocols:
  - Clearly define who will be screened, how the screening will be done, and where the screening will take place.
  - Be consistent.
- PPE/face coverings:
  - Refer to state and local requirements for specifics.
  - Please note: There are potential wage and hour issues if employees must provide their own equipment.
- Restaurants may want to consider simplified menus to reduce overhead and limit the number of employees in tight kitchen quarters.

What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with Jackson Lewis’ latest available information and resources.

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.